Office - Supreme Court, U.
FILED
JAN 22 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 703 - 704

THE LAKESHORE COMPANY,
Petitioner,
v.
THE CITY OF EUCLID,
Respondent,
and
BENJAMIN D. ZEVIN and LILLIAN C. ZEVIN,
Petitioners,
v.
THE CITY OF EUCLID,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

CHARLES W. SELLERS,
National City Bank Building,
Cleveland 14, Ohio,
Counsel for Petitioners.

(*Other Counsel on Inside Front Cover.*)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-1847

FREDERICK A. BALLARD,
American Security Building,
Washington 5, D. C.,

BEN P. RABB,
Chester-12th Building,
Cleveland, Ohio,

DAVID C. PRUDEN,
National City Bank Building,
Cleveland 14, Ohio,
Of Counsel.

TABLE OF CONTENTS.

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statement of the Cases 3

How Federal Question Was Presented 7

Reasons for Granting the Writ:

(a) The Ohio courts have decided a federal question of general importance in the administration of state zoning laws in a way which is directly in conflict with the rule in all other states which have considered the question 8

(b) The Ohio Courts have decided a federal question of substance in a way not in accord with applicable decisions of this Court 9

Conclusion 15

APPENDICES:

A. Opinion of the Supreme Court of Ohio 1a

B. Opinion of the Court of Appeals of Cuyahoga County, Ohio 2a

C(a). Ohio Supreme Court Journal Entry—The Lakeshore Company, Case No. 34,848 ..... 21a

C(b). Ohio Supreme Court Journal Entry—Benjamin D. Zevin and Lillian C. Zevin, Case No. 34,849 ..... 21a

D. Certificate of the Ohio Supreme Court as to Existence of a Federal Question, Case Nos. 34,848 and 34,849 ..... 23a

E. The Lakeshore Company Exhibit 6 ..... 25a

F. Zevin Exhibit 6 ..... 27a

NOV 3 1958

245978

TABLE OF AUTHORITIES.

Cases.

Boom Co. v. Patterson, 98 U. S. 403 (1878) 9

Chicago, Burlington and Quincy Railroad Company v. Chicago, 166 U. S. 226 (1897) 9, 10

City of Austin v. Cannizzo, et al., 153 Texas 324, 267 S. W. 2d 808 9

City of New York v. Sage, 239 U. S. 57 (1915) 10

Hall v. City of West Des Moines, 245 Iowa 458, 62 N. W. 2d 734 9

Kansas City v. Aronson, 282 S. W. 2d 464 9

Long Beach City High School District v. Stewart, 30 Cal. 2d 763, 185 P. 2d 585 9

Olson v. United States, 292 U. S. 246 (1934) 8, 10, 11

People v. Dunn, 297 P. 2d 964 (California) 9

State of Missouri ex rel. State Highway Commission v. Williams, 289 S. W. 2d 64 (Missouri) 9

United States ex rel. Tennessee Valley Authority v. Powelson, et al., 319 U. S. 266 (1943) 10

Village of Euclid et al. v. Ambler Realty Company, 272 U. S. 365 (1926) 15

Constitution of the United States.

Fourteenth Amendment 2, 7, 16

Statute.

28 U. S. C. Section 1257(3) 2

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. ----------.

THE LAKESHORE COMPANY,

Petitioner,

v.

THE CITY OF EUCLID,

Respondent,

and

BENJAMIN D. ZEVIN and LILLIAN C. ZEVIN,

Petitioners,

v.

THE CITY OF EUCLID,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

The Lakeshore Company and Benjamin D. and Lillian C. Zevin respectfully pray that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Ohio entered in the above-entitled cases October 3, 1956.

OPINIONS BELOW.

The two actions to which this petition relates were tried to a single jury in the Cuyahoga County, Ohio, Court of Common Pleas, and no opinions were delivered by the trial judge. The cases were heard together in the Court of Appeals for the Eighth Judicial District of Ohio, and the

opinion of such court affirming the trial court with respect to both actions is unreported and is printed in Appendix B hereof (*infra*, p. 2a). The cases were also heard together in the Ohio Supreme Court, and the single opinion of such court affirming the Court of Appeals decision by dismissing petitioners' appeals is reported in 165 O. S. 501 and is printed in Appendix A hereof (*infra*, p. 1a).

(The journal entries of the Ohio Supreme Court dismissing petitioners' appeals are printed in Appendix C (*infra*, p. 21a).)

JURISDICTION.

The judgments of the Supreme Court of the State of Ohio in both of the present cases were entered October 3, 1956, upon which date the Court dismissed petitioners' appeals and, concurrently therewith but without opinion, overruled petitioners' motions to certify the case records. The judgments became effective October 24, 1956, upon which date motions for rehearing petitioners' appeals were denied.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

The questions involved in petitioners' cases are identical or closely related, and a single petition for certiorari is therefore filed pursuant to the provisions of Rule 23(5) of this Court.

QUESTION PRESENTED.

Is a landowner deprived of property without the due process of law required by the Fourteenth Amendment to the United States Constitution if the jury which determines his compensation in eminent domain proceedings is required to limit its verdict to value for uses permitted under zoning in effect at the time of trial, eliminating all

consideration of the effect upon value of the reasonable probability of zoning change?

Stated otherwise, does a landowner receive just compensation for his property in appropriation proceedings if the jury is not permitted to consider all of the elements which a willing buyer and a willing seller would ordinarily and necessarily take into consideration, thus precluding all opportunity to consider the reasonable probability of change in zoning and evidence of actual market value, the criterion in appropriation cases?

STATEMENT OF THE CASES.

The cases which occasion this petition originated April 27, 1954, when the City of Euclid, Ohio, filed an application to appropriate property and assess compensation in the Cuyahoga County, Ohio, Court of Common Pleas.

The application designated four parcels of land, comprising an area of generally rectangular description in the City of Euclid. The long axis of the rectangle extended approximately 1600 feet from north to south, Lakeshore Boulevard forming the southern boundary and Lake Erie forming the boundary upon the north. The southeastern sector of the rectangle was designated Parcel Number 1, containing slightly in excess of 400 feet of frontage upon Lakeshore Boulevard and extending north approximately 800 feet toward Lake Erie. The western half of the rectangle was designated Parcel Number 2, containing approximately 300 feet of frontage upon the Boulevard and extending north to the Lake. Parcels 3 and 4 completed the northeastern sector of the rectangle, extending from Parcel 1 to the Lake. The entire area contained 23.5 acres of land.

A single jury heard the testimony with respect to all of the parcels described in the application. Evidence re-

lating to the value of each parcel was submitted, and the jury was instructed to return a verdict as to the value of each parcel. Separate trial transcripts were kept for the hearing with respect to The Lakeshore Company's parcels (Parcels 1 and 2A) and for the hearing with respect to the Zevin property (Parcel 2B).[1] The questions presented in each hearing, however, were identical and arose under corresponding circumstances in the respective hearings.[2]

The Lakeshore Company Parcel Number 1 was the first property considered in the trial court. After the parcel was identified, current zoning restrictions and zoning changes affecting neighboring property were introduced, and the Company's first expert witness was qualified. The witness was then asked to state his opinion as to the value of the parcel (Record, p. 151). Counsel for the City objected, maintaining that the witness could answer the question *only* if he would limit his opinion to the value for uses permitted under zoning in effect at the time of the trial. The trial court sustained the objection, ruling that

---

[1] The original application had named the Company as the owner of Parcel 1 and the Zevins as the owners of Parcel 2, in accordance with the record titles. In addition, however, the Company was the owner, but not the record title holder, of the Boulevard frontage of Parcel 2 to a depth of 800 feet. Because the original application would have prevented the Company from demonstrating the value of its parcels in common ownership, the Company obtained an injunction to stay the appropriation action, upon the basis of findings of fact that the Company had purchased the rights to its parcels in 1951 and had notified the City of its ownership upon numerous occasions, including an application for rezoning the property which was in process when the City decided to appropriate. The injunction was dissolved when the City caused the application to be amended to divide Parcel 2 into a southern half (Parcel 2A, owned by the Company) and a northern half (Parcel 2B, owned by the Zevins).

[2] Because of the identity of issues, reference in this petition is confined primarily to the Lakeshore trial transcript (described herein as the "Record").

property must be appraised on the basis of uses permitted "at the present moment" (Record, pp. 154-156). Counsel for the Company requested the opportunity to present the law upon the question, but the court declined to hear argument (Record, p. 156).

The pattern established by the trial court's initial ruling upon valuation testimony was followed throughout the trial proceedings (e.g. Record, pp. 184 and 202). Counsel for petitioners rephrased the valuation question in various ways, asking expert opinion as to the "fair value" (Record, p. 183) and "fair market value" (Record, p. 202) of the properties, but in each instance the trial court sustained objections to the question. In some instances the objections specified that the witness could answer if his opinion were limited to value for uses currently sanctioned by zoning ordinances (e.g. Record, p. 184). In some instances the objection was sustained without qualification (e.g. Record, p. 202).

As a result of the trial court's rulings, the jury was never permitted to receive any of the valuation testimony offered by petitioners, and petitioners were never permitted to explain that reasonable probability of zoning change is an element which must be considered in valuation appraisals.

With only the valuation testimony of the City's witnesses to consider, the jury returned a verdict as to each parcel based upon the highest amount suggested on behalf of the City.

The difference between the valuation concept adopted by the trial court, illustrated by the appraisals of the City's witnesses who testified to values for uses permitted under the current zoning, and the concept utilized by petitioners' expert witnesses, who proffered their appraisals based upon current zoning but taking into consideration

the effect upon value of the reasonable probability of zoning change, is readily apparent from the record. Petitioners' expert witness Malm, for example, proffered valuation appraisals as follows: (Record, pp. 186 and 187; Zevin Record, p. 133)

Parcel 1	Parcel 2A	Parcel 2B
$358,197.00	$286,793.00	$221,000.00

The City's highest appraisals, which the jury utilized for its verdicts,[3] were:

Parcel 1	Parcel 2A	Parcel 2B
$ 60,000.00	$ 47,800.00	$ 54,500.00

At the close of trial, counsel for The Lakeshore Company requested seventeen special instructions for the jury, three of which the trial court utilized.[4] The trial court gave the same three instructions in each hearing. The instructions refused set forth petitioners' contention that the reasonable probability of zoning change is an element which expert witnesses must be permitted to consider in forming valuation opinions and that refusal to permit such factor to be taken into consideration constituted a taking of property without due process of law.

---

[3] The verdicts were as follows: Parcel 1—$60,000; Parcel 2A —$47,800; Parcel 2B—$55,000.

By way of comparison, in 1951 the Company paid $124,750 for Parcel 1 (Zevin Record, p. 114), and $117,500 for Parcel 2A (Zevin Record, p. 109), or a total of $134,450 in excess of the jury verdicts for the Company's parcels.

[4] Similar instructions were requested for the Zevins, with minor variations relating primarily to zoning and tenement restrictions upon the parcels.

How Federal Question Was Presented.

Petitioners' deprivation of property without the due process of law required by the Fourteenth Amendment to the Constitution of the United States (by reason of the acts of the trial and intermediate appellate courts limiting valuation testimony to consideration of uses permitted under zoning in effect at the time of trial) was presented to the Ohio Supreme Court under petitioners' fourth assignment of error and in the brief and argument in support thereof. The certificate of the Ohio Supreme Court, evidencing that the federal question was presented to and determined by such court, is contained in Appendix D (*infra*, p. 23a).

In the Ohio Court of Appeals the violation of due process occasioned by exclusion of petitioners' valuation testimony was raised under petitioners' second and third assignments of error and in the brief and oral argument.

In the trial court the federal question was raised implicitly when the court limited petitioners' valuation testimony to consideration of uses permitted under zoning at the time of trial and refused counsel for petitioners the right to present its objection to the ruling (Record, p. 156). The federal question was raised explicitly by instructions requested for the jury. In particular, instructions X, XI and XIV set forth the basic constitutional objections to the actions of the trial court.

REASONS FOR GRANTING THE WRIT.

(a) The Ohio courts have decided a federal question of general importance in the administration of state zoning laws in a way which is directly in conflict with the rule in all other states which have considered the question.

In a time of increasing frequency of appropriation proceedings, uniform standards for determining the compensation which due process of law requires are of great general concern. Zoning, a relevant factor in the determination of compensation in virtually every metropolitan appropriation, controlled the valuation in the present cases. With the Ohio courts having now ruled that consideration may not be given to the reasonable probability of zoning change, contrary to the highest courts of all other states which have considered the problem, these cases provide an opportunity for the establishment of a uniform and proper rule as to whether current zoning is to be afforded a conclusive effect upon appropriation valuations.

The highest courts of five states, including Ohio, have considered the question of whether valuation testimony in eminent domain proceedings may be limited to consideration of uses permitted under zoning in effect upon the valuation date. California, Iowa, Missouri and Texas have reached essentially the same conclusion, i.e. when reasonable probability of change in zoning restrictions is demonstrated, expert testimony which gives consideration to such probability of change must be admitted. Such rule would appear inevitable under the principles set forth by this Court in *Olson v. United States*, 292 U. S. 246 (1934). Ohio, however, in the instant cases, has concluded to the contrary.

The importance of establishing a uniform rule as to the conclusiveness to be granted zoning restrictions in appropriation valuations is illustrated by the increasing frequency of state court decisions upon the issue. California courts first met the problem in reported decisions, the issue reaching the California Supreme Court in 1947, after two previous lower court decisions. *Long Beach City High School District v. Stewart,* 30 Cal. 2d 763, 185 P. 2d 585. The Iowa and Texas Supreme Courts met the issue directly in 1954, Texas having encountered the issue indirectly in previous decisions. *Hall v. City of West Des Moines,* 245 Iowa 458, 62 N. W. 2d 734 and *City of Austin v. Cannizzo, et al.,* 153 Texas 324, 267 S. W. 2d 808. The Missouri Supreme Court considered the issue in 1955. *Kansas City v. Aronson,* 282 S. W. 2d 464. And in 1956 three courts considered the issue, i.e., the problem reached the Ohio Supreme Court in the present cases and was again considered by the Supreme Courts of California and Missouri. *People v. Dunn,* 297 P. 2d 964 (California); *State of Missouri ex rel. State Highway Commission v. Williams,* 289 S. W. 2d 64 (Missouri).

Undoubtedly the issue presented in the present cases will be raised in other state and federal courts within the foreseeable future.

(b) The Ohio courts have decided a federal question of substance in a way not in accord with applicable decisions of this Court.

That just compensation for owners in condemnation proceedings is a requisite of due process of law has long been established by this Court, e. g., *Boom Co. v. Patterson,* 98 U. S. 403 (1878); *Chicago, Burlington and Quincy Railroad Company v. Chicago,* 166 U. S. 226

(1897). The point of argument in the instant cases, however, arises upon the meaning of the term just compensation as applied to property subject to zoning restrictions.

This Court has had frequent occasion to determine the meaning of just compensation in appropriation proceedings, and little purpose would appear to be served by an exhaustive analysis or citation of such decisions. The basic requirements for just compensation were set forth by Mr. Justice Harlan in *Chicago, Burlington and Quincy Railroad Company v. Chicago, supra,* when he stated that a property owner receives just compensation if, under all the circumstances, he is awarded a "fair and full equivalent" for the thing taken from him by the public.

This Court has also applied the basic principles of just compensation to circumstances in substance parallel to those of the present cases, concluding that due process of law requires that all uses for which property is suitable must be considered in determining just compensation, subject to the qualification that elements within the realm of possibility but not fairly shown to be reasonably probable should not be considered. *Olson v. United States,* 292 U. S. 246 (1934); *City of New York v. Sage,* 239 U. S. 57 (1915); *United States ex rel. Tennessee Valley Authority v. Powelson, et al.,* 319 U. S. 266 (1943).

As previously noted, the state courts other than Ohio which have considered the degree of conclusiveness to be afforded zoning restrictions in appropriation valuation have recognized the reasonable probability issue. Acknowledging that zoning is one factor to be considered in valuation, such courts have reviewed the question of whether reasonable probability of zoning change existed under the particular circumstances and, where it could fairly be found that such probability did exist, testimony taking into consideration the effect of such probability

upon valuation has been admitted. In essence, such courts have simply applied the rule of *Olson v. United States, supra.*

Ohio, on the other hand, has concluded in the present cases that current zoning is in itself controlling of valuation.

To demonstrate the approach of the Ohio courts, a review of the lower court rulings and opinions is necessary. And as the Ohio Supreme Court affirmed the lower court decisions by dismissing petitioners' appeals, stating only that no debatable constitutional question was involved, attention must be directed to the acts and opinion of the trial and intermediate appellate courts.

The manner in which the trial court established the Ohio rule limiting valuation testimony to consideration of uses permitted under current zoning can best be illustrated by a reference to the point in the trial transcript where objection to testimony of petitioners' expert witnesses was first raised (Record, p. 154):

> "Mr. Sellers: Is your Honor limiting us, by any chance, to evaluation based upon an as zoned basis?
>
> "The Court: Evaluation, Mr. Sellers, must be placed for the best and highest use to which it may be put. That is the best valuation.
>
> "Mr. Sellers: To which it may be put at the present time or in the reasonably foreseeable future?
>
> "The Court: At the present time, sir.
>
> "Mr. Sellers: And only at the present time?
>
> "The Court: Correct."

As the trial court would not hear argument upon the valuation question, the trial was controlled entirely by the initial evidence ruling. Having taken the position that reasonable probability of zoning change was immaterial,

the court both before and after its initial valuation ruling sustained objections to the introduction of all of the significant portions of petitioners' evidence by means of which the reasonable probability of zoning change was to be demonstrated.

The approach of the Court of Appeals to the problem is clear from the statements contained upon page 19a of the opinion (Appendix B) which indicate the court's view that consideration of zoning change is "too speculative." The court further supported its opinion by reference to a statute enacted after the present trials, which the court believed declared the policy of the Ohio Legislature against consideration of zoning change. (Appendix B, pp. 19a and 20a.) As the statute became effective four months after the present trials, it will not be reviewed further herein, other than by way of comment that if the statute means what the Court of Appeals believed, the statute is subject to all of the constitutional objections raised in the instant cases.

The Court of Appeals did not stop with an indication of its belief that consideration of probability of zoning change was "too speculative." The court added the flat statement that the court found no "evidence" to support the contention that a change in the zoning ordinances was likely to occur, leaving the obvious alternative argument that the court was not necessarily sustaining the principle of conclusiveness of present zoning upon valuation.

The key to the Court of Appeals' evidence statement lies in the fact that the trial court, having foreclosed itself from hearing of the decisions which require consideration of reasonable probability of zoning change (See Record, p. 156), excluded the significant portions of the very evidence which would have established such reasonable probability, conclusively.

For example, the trial court refused to permit testimony as to changes from single residence to apartment zoning required and granted by the City for the extensive garden apartment development which extends 1000 feet north of Lakeshore Boulevard 250 feet to the east of petitioners' property (upon the "lake" side of the street—See Zevin Exhibit 6 (Appendix F) *infra*, p. 27a) and testimony as to similar zoning changes required for other garden apartment developments upon both sides of Lake Shore Boulevard since World War II (Zevin Record, pages 97 and 98). The court also sustained objection to the question of what property in the neighborhood had been rezoned for business within two or three years (Record, p. 99). The court likewise refused to permit testimony by officers of the Regional Planning Commission (the public planning body employed by the City of Euclid to prepare a plan of development for the area two years prior to the appropriation resolution) with respect to recommendations made by the Commission to the City for rezoning of petitioners' property (Record, p. 216) and the court also refused to admit the report made by the Regional Planning Commission to the City of Euclid, despite testimony by the Commission officers that the organization was a body created by Ohio statute for municipal and other planning for member cities, including Euclid, which report indicated that petitioners' property, formerly large country estates, had become unsuited for the former usage and too valuable for the city to expect single residence development, the conclusion of the report being that the property should be rezoned precisely as petitioners contended, i.e., for apartments or retail stores (petitioners' proffered exhibits 11 and 12).

Further examples of the exclusion of evidence relevant to the determination of reasonable probability of

zoning change occur throughout the Record, e.g., the court refused testimony as to the number of changes in zoning made by the City (Record, p. 196); the court sustained objection to testimony showing values of property recently rezoned for business and development of a shopping center directly across the street (Record, p. 264; See Lakeshore Exhibit 6 (Appendix E) *infra*, p. 25a); the court sustained objection to testimony as to the disposition of petitioners' application for rezoning in 1952, prior to the City's decision to appropriate (the proffered answer being that the application was referred to the Regional Planning Commission for its recommendation but the reference was subsequently canceled by the Mayor of Euclid when the City determined to appropriate the property (Record, p. 222); and the court summarized its position by indicating in instructions to the jury (Record, p. 385) that the true market value of property is determined by consideration of the uses to which the property might be put "at this moment."

It is evident from the rulings of the trial court that if the Court of Appeals was correct in finding no "evidence" of reasonable probability of zoning change, it was because the trial court systematically, with a few exceptions, excluded such evidence.

That the Court of Appeals noted no indication of "any purpose on the part of the public authorities" to change zoning (Appendix B, p. 18a) and did not find a plan of city development which would "require" such changes (Appendix B, p. 18a) necessarily follows from the trial court's rulings, although any intent which the appropriating municipality might express at the time of trial as well as consideration of whether zoning changes could be *forced* upon the appropriating municipality would appear at best to be of only incidental relevance in determining whether,

in view of all the circumstances, there was *reasonable probability* of zoning change which a willing buyer would necessarily weigh.

By determining the federal question involved in these cases (See Appendix D, *infra*, p. 23a) the Ohio Supreme Court has established a valuation rule—contrary to principles set forth by this Court—prohibiting eminent domain juries from all consideration of the effect of reasonable probability of zoning change upon value of property taken for public use. Ohio has, accordingly, established a limited market value as the standard of compensation in appropriation proceedings.

CONCLUSION.

By the decision in *Village of Euclid et al. v. Ambler Realty Company*, 272 U. S. 365 (1926), this Court established the principles and founded the basis on which modern zoning has developed. The present cases, involving the same City, now offer an opportunity for the establishment of a uniform rule for the reasonable and proper administration of zoning ordinances.

The contrast between the village of 5,000 inhabitants at the time of the *Ambler* decision and the present city of approximately 60,000 with extensive retail development in the immediate area in question speaks eloquently for the necessity of the reasonable probability rule for which petitioners contend.

Yet, under the rule now established by the Ohio Courts, no opportunity would ever be afforded for the jury to consider zoning changes because the jury would never have before it all of the elements of market value which a willing buyer and a willing seller would consider.

If this rule initiated by the Ohio Courts is permitted to stand, then municipalities in that state will possess

powers unique in and repugnant to our jurisprudence—they can confiscate by use of zoning and appropriate for a comparatively modest consideration.

For the reasons set forth herein, petitioners respectfully pray that a writ of certiorari issue to the Supreme Court of the State of Ohio so that this Court may review the decision of the Ohio Supreme Court depriving petitioners of property without the due process of law required by the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

CHARLES W. SELLERS,
Counsel for Petitioners.

FREDERICK A. BALLARD,
BEN P. RABB,
DAVID C. PRUGH,
Of Counsel.

APPENDIX.

APPENDIX A.

Opinion of the Supreme Court of Ohio.

CITY OF EUCLID, APPELLEE, v. THE LAKESHORE CO. ET AL., APPELLANTS.

CITY OF EUCLID, APPELLEE, v. ZEVIN ET AL., APPELLANTS.

Supreme Court—Dismissals—No debatable constitutional question involved—Appropriation of property—Assessment of compensation—Section 19, Article I, Constitution—Probability of change in current zoning—Equity—Jurisdiction—Chapter 719, Revised Code—Due process—Sections 1 and 16, Article I, Constitution—Section 1, Article XIV, Amendments, U. S. Constitution.

(Nos. 34848 and 34849—Decided October 3, 1956)

APPEALS from the Court of Appeals for Cuyahoga County.

Mr. Paul H. Torbet, director of law, and Mr. Perry L. Graham, for appellee.

Messrs. Thompson, Hine & Flory, Mr. Charles W. Sellers and Mr. David C. Prugh, for appellants.

It is ordered and adjudged that these appeals as of right be, and the same hereby are, dismissed for the reason that no debatable constitutional question is involved.

Appeals dismissed.

WEYGANDT, C.J., MATTHIAS, HART, ZIMMERMAN, STEWART, BELL and TAFT, JJ., concur.

APPENDIX B.

Opinion of the Court of Appeals of Cuyahoga County, Ohio.

No. 23610.

IN THE COURT OF APPEALS OF OHIO

CUYAHOGA COUNTY, EIGHTH DISTRICT.

THE CITY OF EUCLID,

Plaintiff-Appellee,

vs.

THE LAKESHORE COMPANY, *et al.*,

Defendants-Appellants.

OPINION.

March 22, 1956.

SKEEL, *J.*:

This appeal comes to this Court on questions of law from judgments entered on separate verdicts of a jury in separate proceedings of the trial to determine the value of five parcels of land appropriated for park purposes by the City of Euclid. As the proceedings were initiated by the City, seven parcels, all contiguous, with a total frontage of about nine hundred feet on the north side of Lake Shore Boulevard just east of East 226th Street and extending northerly to Lake Erie, a distance of about seventeen hundred feet, were included in the resolution. The City, by its Council, passed a resolution on November 17, 1952, as authorized by Sec. 719.04 R. C., declaring its intention to appropriate the property described, the purpose for which the property was to be taken, the persons to be notified and the interest to be appropriated. Thereafter on March 15, 1954, after all procedural requirements as

prescribed by Sec. 719.05, to perfect the appropriation of the property for park purposes, had been complied with, the City Council of Euclid passed Ordinance 10299 as provided by Sec. 719.06 R. C., authorizing the Law Director to file this action to appropriate a part of the property described in the original resolution. The land to be taken was a contiguous tract of about twenty-five acres described in four parcels according to ownership as shown by the public records. Parcel No. 1, recorded in the name of the defendant, The Lakeshore Company, by deed dated December 21, 1951, from the defendant, Eugene E. Vogelin has a frontage of about four hundred feet on the north side of Lake Shore Boulevard and is directly east of the front part of Parcel No. 2, recorded at the time the petition was filed in the name of the defendants, Benjamin and Lillian Zevin. Parcel No. 2 (subsequently divided) recorded in the names of defendants Zevin has a frontage of about two hundred ninety nine feet on Lake Shore Boulevard and extends about seventeen hundred feet to the shore of Lake Erie. This parcel was divided into Parcels Nos. 2A and 2B, the front part (Parcel No. 2A) (which was transferred from the defendants Zevin to The Lakeshore Company on the registered title records of Cuyahoga County after the filing of this case) is located on Lake Shore Boulevard as above described and has an average depth of about eight hundred feet. Parcel No. 2B is the northerly part of the Zevin property with a frontage on Lake Erie of about three hundred twenty five feet and is about nine hundred feet deep. Parcel No. 3, in the name of Robert J. and Irma Bradley, is seventy-five feet wide on its southerly boundary and is seven hundred thirty three feet deep, its north boundary fronting on Lake Erie, and, before being deeded to the Bradleys, was the northeast corner of the property of the defendant Euguene E.

Vogelin and his wife. Parcel No. 4 is that of the defendants, Eugene E. Vogelin and his wife, which is bounded on the south by Parcel No. 1, which these defendants sold to The Lakeshore Company, on the west by Parcels Nos. 2A and 2B, originally all in the name of the Zevins, on the north by Lake Erie and on the east in part by Parcel No. 3. Parcels Nos. 1, 2A, 2B, 3 and 4 together comprise a contiguous tract of land of about twenty-five acres with a frontage of about seven hundred feet on the north side of Lake Shore Boulevard, being about seventeen hundred feet deep and having a somewhat wider frontage on Lake Erie. The Bradley's deed provided for an easement over the Vogelin's property for ingress and egress and utility services to Lake Shore Boulevard. The Vogelins retained like privileges for themselves and the Bradleys over Parcel No. 1 when it was deeded to The Lakeshore Company. The Zevins retained an easement for ingress and egress and for utility services to Lake Shore Boulevard for Parcel No. 2B, over Parcel No. 2A when Parcel 2A was deeded by them to The Lakeshore Company.

The zoning restrictions of the City of Euclid, dealing with this property at the time of trial and for many years prior thereto (1927), provided for U-3 use (multi-family dwellings) for the frontage of the property on Lake Shore Boulevard to a depth of one hundred fifty feet and for U-1 use (single family dwellings) for the balance of property north of the one hundred fifty foot strip to the shore of Lake Erie.

The property on the south side, or across Lake Shore Boulevard from the property taken by the City in this action, from East 218th Street to East 232nd Street, is zoned for and has for a number of years past been used for retail business as are a few properties on the north side of Lake

Shore Boulevard between East 218th Street to East 224th Street, the last mentioned business properties being two blocks west of the property here being taken. With this exception and two or three others of long standing, the property on the north side of Lake Shore Boulevard from the east border to the west border of the City is used as zoned for single family dwellings north of the one hundred fifty foot strip fronting on Lake Shore Boulevard. This strip was zoned for multi-family dwellings until the amendment of 1955 when most of the frontage was changed to U-2 use (two-family houses). There is no evidence in the record that would indicate that there is the slightest probability that the city authorities will lessen the use restrictions of its zoning ordinances in the neighborhood in which the property here appropriated is located. The property of the defendants is lakefront property originally used as country estates and surrounded by single family dwellings and apartments, some of the garden-type, and two-family houses fronting on the Boulevard. The zoning ordinances of the City of Euclid have maintained the standard of this territory as a residential area and there is not the slightest evidence that within the foreseeable future any lessening of use restrictions will occur.

Upon trial, the jury by its separate verdicts, found the value of each of the several parcels as follows:

Parcel No. 1 —The Lakeshore Company	$ 60,000
Parcel No. 2A—The Lakeshore Company	47,000
Parcel No. 2B—Benjamin D. and Lillian C. Zevin	55,000
Parcel No. 3 —Robert J. and Irma Bradley	23,000
Parcel No. 4 —Eugene E. and Marian Vogelin	37,500

In each instance the jury's verdict was for the highest value given by the city's expert witnesses, there being no other testimony on the subject of value, the defendants'

experts not being asked to testify as to their opinion of the value of the various parcels when considered for the highest and best use for which the property was zoned.

The claims of error presented on the appeal of The Lakeshore Company are:

> "1. The Trial Court erred in ruling that the Court had jurisdiction to hear the appropriation proceedings despite failure of the City of Euclid to comply with the statutory requirements prescribed for municipal appropriation proceedings."
>
> "2. The Trial Court erred in refusing to permit Defendant-Appellant to introduce testimony as to the fair market value of the property to be appropriated unless such testimony was limited to the value of the property for uses permitted under current zoning restrictions."
>
> "3. The Trial Court erred in refusing to instruct the Jury in accordance with defendant-appellant's requested instructions I to XI, Inclusive, XIII, XIV, and XVII."

Each of the appellants assign the same errors.

The first assignment of error deals with the jurisdiction of the court to determine the value of the property taken for the alleged failure to comply literally with Sections 719.04, 719.05 and 719.06 of the Revised Code. These sections provide:

> "SECTION 719.04
>
> "The legislative authority of a municipal corporation shall, whenever it is deemed necessary to appropriate property, pass a resolution declaring such intent, defining the purpose of the appropriation, and setting forth a pertinent description of the land and the estate or interest therein desired to be appropriated."

"SECTION 719.05

"The mayor of a municipal corporation shall, immediately upon the passage of a resolution under section 719.04 of the Revised Code, declaring an intent to appropriate property, for which but one reading is necessary, cause written notice to be given to the owner of, person in possession of, or person having an interest of record in, every piece of property sought to be appropriated, or to his authorized agent. Such notice shall be served by a person designated for the purpose and return made in the manner provided for the service and return of summons in civil actions. If such owner, person, or agent cannot be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the municipal corporation, and the legislative authority may thereupon pass an ordinance by a two-thirds vote of all members elected thereto, directing such appropriation to proceed."

"SEC. 719.06

"The solicitor of a municipal corporation shall, upon the passage of an appropriation ordinance under section 719.05 of the Revised Code, make application to the court of common pleas or to a judge in vacation, or to the probate court in the county in which the land sought to be taken is located, which application shall describe, as correctly as possible, the land to be appropriated, the interest or estate therein to be taken, the object proposed, and the name of the owner of each lot or parcel thereof."

No complaint is made as to the resolution adopted by the Council on October 25, 1952, as the initial step in taking a fee simple interest in the property described for park purposes.

There is no question but that notice was given as required by Sec. 719.05, supra, and that subsequently the

City Council passed the appropriation ordinance authorizing the Law Director to file application in the Common Pleas Court as directed by Sec. 719.05, R. C., *supra*, to take four of the seven parcels described in the resolution, setting forth in the ordinance a description of the land by parcels, the interest to be taken as to the entire tract, naming the owner of each parcel at the time the ordinance was passed.

The complaint of each appellant is that the easements recorded in the owners of Parcels Nos. 2B, 3 and 4, over or in Parcels Nos. 1, 2A, 3 and 4, were not set forth in either the resolution passed in October 1952, or the ordinance authorizing the filing of the Application to appropriate the land. It is, therefore, claimed that the right to take a valuable interest (the easements) not being included in the legislation required to authorize the appropriation proceedings in this case, the court was without jurisdiction to proceed to fix the value of the property taken.

Both the statute providing for the passage of the resolution declaring the intent to appropriate property and the statute authorizing the filing of the petition to appropriate the property and to determine the value of the property taken provide that a pertinent description of the land and the interest to be taken shall be set forth. This means the interest (in this case, a fee simple interest) to be appropriated, not the interest to be taken from any particular owner. All that is required as to the several owners, if there be more than one, is that notice in writing be given to persons having an interest of record in the manner of service and return of summons in civil actions. The character of the interest in a particular parcel need not be set forth.

The object of the proceedings in appropriation is to determine the value of the property taken. If a fee simple interest in all the property is to be taken, then the full and complete value of each parcel must be found by the jury. In the case of *Emery v. City of Toledo,* 121 O. S. 257, the second paragraph of the syllabus provides:

> "In such appropriation proceedings the only issue relates to the value of the property."

In the case of *Sowers, Supt. v. Schaeffer,* 155 O. S. 454, the court said in the first paragraph of the syllabus:

> "A land appropriation proceeding is essentially one in rem; it is not the taking of the rights of persons in the ordinary sense but an appropriation of physical property. In the event there are several interests or estates in the parcel of real estate appropriated, the proper method of fixing the value of each interest or estate is to determine the value of the property as a whole, with a later apportionment of the amount rewarded among the several owners according to their respective interests, rather than to take each interest or estate as a unit and fix the value thereof separately. The separate interests or estates as between the condemner and the owners are regarded as one estate."

Likewise in the case of *Sowers, Supt. v. Schaeffer,* 152 O. S. 65, the Supreme Court said in the second paragraph of the syllabus:

> "A proceeding to appropriate property for a public use is essentially in rem, and where property is sought in which separate interests or estates are owned by several persons as between the condemner and the owners it is regarded as one estate and one offer or award as compensation for the entire land and the interests connected therewith is made, which sum takes the place of the property appropriated as the equivalent thereof. The division and distribution of the sum

offered and accepted or of the award made among the owners of separate interests or estates rests wholly with them, and the condemner has no concern therewith."

and on page 69, Judge Zimmerman said:

"An appropriation proceeding is essentially one in rem; it is not the taking of the rights of persons in the ordinary sense but an appropriation of physical properties. In the event there are several interests or estates in the parcel of real estate appropriated, the proper method of fixing the value of each interest or estate is to determine the value of the property as a whole, with a later apportionment of the amount awarded among the several owners according to their respective estates, rather than to take each interest or estate as a unit and fix the value thereof separately. Hence, separate interests or estates, as between the condemner and the owners, are regarded as one estate. One award constitutes compensation for the entire value of the land and it stands in the place of the property appropriated as the equivalent thereof. The division and distribution of the award among the owners of separate interests or estates rests wholly with them, and the condemner is not concerned therewith. Bogart v. United States (C. C. A. 10), 169 F. (2d), 210; City of St. Louis v. Rossi, 333 Mo., 1092, 64 S. W. (2d), 600; 69 A. L. R., 1263, annotation; 166 A. L. R., 1211, annotation; 29 Corpus Juris Secundum, 1102, Eminent Domain, Section 197. Compare Martin v. City of Columbus, 101 Ohio St., 1, 127 N. E., 411."

and on page 70, Judge Hart, in a concurring opinion says:

"* * * Thus in a single action a single award may be made to the holders of the fee, lienholders, lessees, easement holders or holders of any equitable title or interest in the tract or parcel of land. 29 Corpus Juris Secundum, 1102, 1103." (Emphasis added.)

The appellants cite the case of *Rockwell v. Turnpike Comm.*, 98 Oh. App. 199, as authority that an easement must be separately taken in an appropriation case. In that case a drainage easement was needed on property outside the turnpike right of way. There was also a claim for damage to the residue owned by the defendant the residue being the same land through which drainage pipes were to be constructed. These facts are totally different from those in the case before us where the land taken includes all the lands subjected to the easements and also all lands benefited by such easements.

One other fact is claimed by the appellants as destructive of the court's jurisdiction to proceed with the trial of this case. After this action was commenced, the defendant, The Lakeshore Company, claimed to be the owner of Parcel No. 2A, although the Torrens Title was still in the Zevins. The Lakeshore Company brought an action to enjoin further proceedings because it was claimed by said defendant that it was then the owner of both parcels Nos. 1 and 2A (contiguous parcels), having a total frontage of seven hundred feet on Lake Shore Boulevard, and that for some purposes the land when considered as one parcel was of greater value than the sum total of its component parts considered separately.

Upon trial of the injunction case, the court granted a conditional restraining order preventing the appropriation case from proceeding unless an amended petition was filed showing title to Parcel No. 2A transferred from the Zevins to The Lakeshore Company. The plaintiff then amended its petition as directed by the court and the injunction was dissolved. Error is now prosecuted to this Court from the order dissolving the restraining order by separate appeal which will be separately considered.

We hold here that amending the application or petition before the case was set for trial which came about because of the demands of the defendant, The Lakeshore Company, in no way divested the trial court of jurisdiction to proceed to determine the value of the properties taken. This conclusion is bottomed on the facts of the case. The Zevins' property was torrenized. The fact that some information had come to the city that it was the intention of the Zevins to transfer title to Parcel No. 2A to The Lakeshore Company does not change the fact when the legislation was passed and the application was made to the court seeking to appropriate this property, the registered title was in Benjamin D. Zevin and his wife. They were, therefore, necessary parties to the action involving Parcel No. 2. Where registered titles are taken, only the registered owner is a necessary party. Sec. 5309.28 R. C. It might also be here stated that the easement created over Parcel No. 2A for ingress and egress and utility services for Parcel No. 2B was not created until after this action was brought, such right being created in the deed from the Zevins to the syndicate and by them to The Lakeshore Company. Without here deciding the question of whether The Lakeshore Company had any legal right to enjoin the prosecution of a pending proceeding to determine the value of property being taken by appropriation for the reason that after the action had been begun, it became the holder of the legal title to an additional parcel which parcel was already included and described in the enabling legislation and petition, claiming that the value of both, when held together by one owner, is greater than the total value of each parcel valued separately, we hold that the amendment, requested by the defendant, when made showing the change of ownership in the properties to be taken from persons already

defendants in the action, did not divest common pleas court of jurisdiction to proceed to fix the value of the property.

The defendants rely strongly on the case of *Grant v. Village of Hyde Park,* 67 O. S. 166. The facts of this case are clearly distinguishable. The statute by which municipal corporations exercised the right of eminent domain at the time of the *Hyde Park* case provided for the passage of but a single ordinance by which private property could be appropriated for public use. The passage of such an ordinance constituted the "taking." As said on page 173 of the opinion:

> "* * * It (the ordinance) seeks to acquire that precise property, or, putting it in different form, it has already appropriated the property described for the proceeding in court is one simply for ascertainment of the amount of compensation to be paid the landowners."

After the ordinance had been passed and the case filed to fix the value of the property taken and damage to the residue and the case was on trial, some evidence was offered tending to show that the City Council passed an ordinance authorizing the city solicitor to stipulate that the City, in constructing the street over the property appropriated, would not establish the grade of the new street that would require taking a deeper cut in the land taken of more than five feet. This was done because the evidence tended to show that there would be no damage to the residue unless the grade of the street required a deeper cut than five feet. Any such stipulation would change or lessen the rights of the village by its resolution to take the property in question. Such resolution, when passed, contained no limitations or qualifications. The

Supreme Court said in paragraphs two and three of the syllabus:

> "2. The question of what is to be appropriated is determined by the resolution of the council and the application filed in court in conformity therewith. And where the application makes a general demand for an appropriation for street purposes, and prays that a jury be impaneled to make inquiry into and assess the compensation to be paid the landowners, and the inquiry proceeds on such application without amendment, the effect of the judgment of condemnation is to give to the municipality the right to use the land taken for all street purposes, including the right to establish a reasonable and proper grade. Hence, the question of probable future grade of the street is a proper subject of inquiry in the ascertainment of damages to the residue of the land.
>
> "3. The council of such municipality has not power, by an ordinance passed while the condemnation suit is being tried, to change the terms of its resolution and of its application so as to ask to appropriate more or less than is therein demanded."

The defendants stress the claim that because Parcels Nos. 1, 2A and 4 are subject to easements for ingress and egress and public utility services for the benefit of parcels 3, 4, and 2B, that in the event the City should take only Parcels Nos. 1 and 2A, the easement rights of the owners of Parcels Nos. 3, 4, and 2B over Parcels Nos. 1 and 2A, would be cut off to their irreparable damage. Such assumption is without legal foundation. The physical facts as to the location of the parcels indicates that when the defendants, Vogelin, deeded Parcel No. 3 to the Bradleys, the only means of ingress was over the land of the grantor and at the time of filing the deed, an established roadway was in use and utility connections in place. These same facts are true as to Parcel No. 1 when deeded by the

Vogelins to The Lakeshore Company and as to Parcel No. 2A when deeded to The Lakeshore Company by the Zevins. True, all necessary easements were provided for by the respective deeds but this does not mean that all three lakefront owners would otherwise be barred from the right to reach a public highway over the servient estate of the respective grantees. In the case of *Jones v. Bethel*, 20 Oh. App. 442, in considering this question, the Court said in paragraphs 2, 3, and 4 of the syllabus:

> "2. Where private way was constructed on one part of single tract, and was open, apparent, and in use at time of division of tract, and reasonably necessary to enjoyment of part not covered by way and materially adding to its value, a grant of way in favor of such part arises by implication.
>
> "3. Situation of parties at time single tract is divided determines grant by implication of private way in favor of part of tract not covered by way.
>
> "4. In determining whether grant of private way may be implied in favor of land owned by plaintiff which was part of single tract with defendant's land containing way, it is immaterial whether plaintiff may get to part of tract touched by way through other land owned by him."

Also, in the first and second paragraphs of the syllabus of the case of *Mosher v. Hibbs*, 1 C. C. N. S. 49, the court said:

> "1. Where the owner of a body of land, during his occupancy of it, constructs a private way over one part of it to another, as a means of egress and ingress to the latter from the public highway, which way is apparent, continually used and reasonably necessary to the use and enjoyment of the land to which the way is constructed, and also adds materially to its value, and afterwards sells and conveys by deed the part with the way to it, and retains the part with the

way over it, his grantee takes his part, to be enjoyed with reference to the way as the same existed at the time of the conveyance, with an implied grant of the way to it over that retained by the grantor, as an easement therein.

"2. Such private way is an appurtenance to the tract conveyed, and the right thereto passes without being expressed in the deed."

The rights of way provided for by the respective deeds would have come into being as a right of necessity by law, an appurtenance of the dominant estate in each case and as a legal obligation of the servient estate; and the taking of the servient estate does not destroy the easement of necessity even though the contract right is taken in the appropriation of the fee simple interest. Public policy will not permit the cutting off of an easement necessity.

In the case of *State, ex rel. McNutt v. Orcutt,* 211 Ind. 523, 199 N. E. 595, the court said:

"8. In condemnation proceedings by the state to take a portion of a fruit and berry farm, over which a way of necessity as means of egress and ingress to the remainder was in use, the fact that the way had been closed by gates or bars except during the fruit and berry season when the way was open for the public would not restrict the right of the owner of the dominant estate to keep the way open if such was necessary for a fair enjoyment of the remainder for the purposes for which it was used.

"9. Where a reservation of a way of necessity over land appropriated by the state is implied for the use and enjoyment of the remainder of the land, the character of the way will not be controlled by any temporary or provisional arrangement or use, but will be established by the necessity for the use to which the land has been accustomed."

The verdict of the jury as to each parcel taken, having given consideration to the value of the parcels affected by the respective easements, this claim of error must be overruled.

We come now to consider the defendants' second claim of error. The court, over the objection of the defendants, limited the evidence of the value of the properties taken to the highest and best uses for which it was available within the zoning restrictions. It is the contention of the defendants that the expert witnesses should have been permitted to take into consideration both the present uses to which the property could be legally devoted and its most valuable use or highest and best use when considered in the light of reasonable and probable zoning changes at some indefinite but closely related time in the future. The defendants bottomed their contention on the claim that the zoning ordinances of the City of Euclid are antiquated, that the neighborhood is experiencing a rapid and continuing growth far beyond that of other parts of the county, that there is need for further retail development in the area and that this property is situated similarly to other property in the neighborhood (across the Boulevard) now zoned for retail business, the change to retail business classification of such other property being of recent date. It is claimed that the expanding population of the neighborhood requires multi-family units and that this property is one of a very few large plots left in the area which could be accommodated to such development. The defendants' expert witnesses testified that the "best use" for Parcels Nos. 1 and 2A was for retail business and the balance of the property for multi-family dwellings.

In support of the court's ruling limiting evidence of value to uses within the zoning restrictions, the City cites

the history of its zoning laws in maintaining almost without change its residence districts, and that the property involved here is lakefront property. The evidence shows that all of the lakefront property from the southern shore of Lake Erie to Lake Shore Boulevard is zoned for single family dwellings except the property fronting on the Boulevard in most instances to a depth of one hundred fifty feet which is zoned for multi-family units. This depth has been extended one or two hundred feet in one or two instances for a garden-type multi-family development. The only retail business now allowed on the north side of Lake Shore Boulevard, near the property taken as shown by the evidence, is between 218th Street and 224th Street. As was stated above, there is no evidence in this record that would indicate any purpose on the part of the public authorities or the slightest probability that the City will within the foreseeable future lessen the use restrictions of its zoning ordinance dealing with its lakefront property nor does any trend of development in the neighborhood where this property is located indicate that in the foreseeable future a plan of city development of single homes will in the interests of city planning require changes causing greater congestion and increased traffic hazards on its public thoroughfares. It could be argued that the rapid growth of this city of homes came into being because of the zoning protection of the householder. In all events a city is not required to lessen its zoning standards because of increased demands for home sites in the community and such demands cannot be the foundation for a claim that reasonable administration of the zoning laws would require a reduction of zoning classifications to make way for a greater concentration of the population. Only where zoning restrictions fall into disuse can such claims be made.

The determination and fixing of zoning classification of the territory of a city is within the sound discretion of its legislative authority in the exercise of its police power to protect the public health, morals, safety and the general welfare of the people. *Cleveland Trust Co. v. Village of Brooklyn*, 92 Oh. App. 351. To speculate on what may be the legislative policy of a municipal council of a city or village in the future in changing a particular zoning classification when considered for the purpose of fixing the value of land taken for public purposes is of such a speculative character that a court should not permit such evidence of value of the property to be presented in the trial of a condemnation proceeding. The question has not been dealt with as yet by the reviewing courts of this state but at the last session of the Legislature, Sec. 719.09 of the Revised Code was amended to read:

> "The assessment of compensation by a jury as provided in Sec. 719.08 of the Revised Code shall be in writing signed by the jury and shall be so made that the amount payable to the owners of each lot or parcel of land be ascertained.
>
> "In arriving at such assessment of compensation for such lot or parcel, any use or occupancy which is in violation of any statute or ordinance [shall] be excluded from consideration in determining fair market value."

Certainly the legislative policy of the state has been clearly fixed by this statute although such statute is not directly applicable in this trial.

The evidence shows that the defendants gave no consideration to possible zoning changes in dealing with Parcels Nos. 1 and 2A as shown by revenue stamps on the respective deeds introduced by them as evidence in the case. As to Parcel No. 2A, the revenue stamps were in the

amount of $64.35, indicating a value of a little under $60,000. The jury's verdict as to the value of this parcel was $47,800. The value as shown by defendant, The Lakeshore Company's expert witnesses, as tendered into the record, was about $280,000, as shown on page 11 of this defendant's brief. The transfer of title took place just before the trial.

There being no evidence to support the contention that within the reasonable foreseeable future and in the reasonable administration of the zoning laws of the City of Euclid, a reduction of the zoning classification of the property taken in these proceedings will be likely to occur and likewise, by reason of the legislative policy of this state in declaring such evidence inadmissible in an appropriation case, we affirm the trial court in limiting the expert evidence as to the value of the several parcels taken to the highest and best use when considered for the uses permitted within the zoning ordinance applicable to such property as of the date of the trial of the case.

Coming to this conclusion, the third claim of error must be likewise overruled.

For the foregoing reasons, the judgments fixing the value of the several parcels are affirmed.

Exceptions. Order see journal.

KOVACHY, P. J., HURD, J., concur.

APPENDIX C.

(a) Ohio Supreme Court Journal Entry—The Lakeshore Company, Case No. 34,848.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellants its costs herein expended, taxed at $_____.

ORDERED, That a special mandate be sent the Court of Common Pleas of Cuyahoga County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."

(b) Ohio Supreme Court Journal Entry—Benjamin D. and Lillian C. Zevin, Case No. 34,849.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellants its costs herein expended, taxed at $_____.

ORDERED, That a special mandate be sent the Court of Common Pleas of Cuyahoga County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."

APPENDIX D.

Certificate of the Ohio Supreme Court as to Existence of a Federal Question, Case Nos. 34,848 and 34,849.

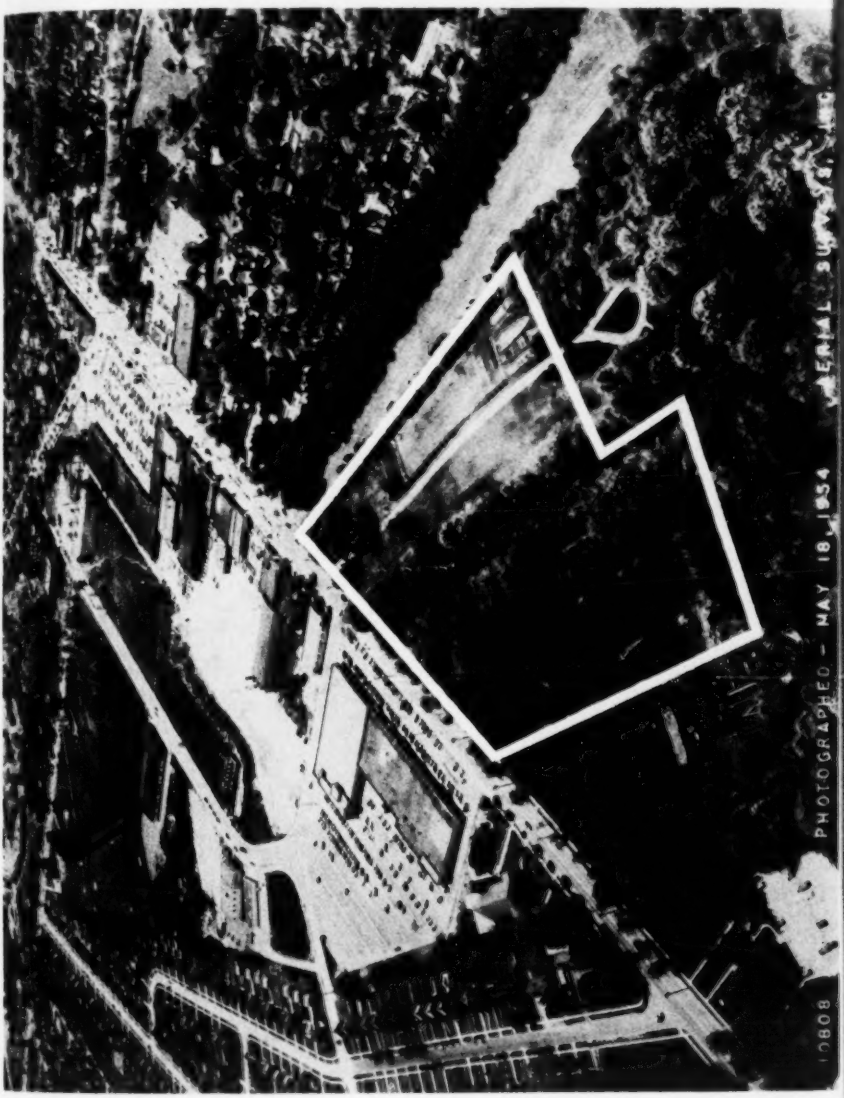
On motion of The Lakeshore Company, Defendant-Appellant in case No. 34,848, and Benjamin D. and Lillian C. Zevin, Defendants-Appellants in case No. 34,849, this court, in addition to the orders previously made herein, orders it to be certified and made a part of the record in this case and of the judgment and entry heretofore rendered and made herein, that in the appeal from the Court of Appeals for the Eighth Judicial District of Ohio, and in the arguments, both oral and by brief, made in this court on behalf of said defendants-appellants, it was insisted and relied upon by said defendants-appellants that they were deprived of property without the due process of law required by the provisions of the Fourteenth Amendment to the United States Constitution by reason of the rulings of the trial court excluding all valuation testimony not based solely upon value for uses permitted under zoning in effect at the time of trial and by reason of rulings of the trial court permitting these cases to proceed after oral amendment to the original appropriation application; that it became material to the determination of said cases in this court to determine each of the foregoing federal constitutional questions so presented by defendants-appellants, as appears in the entry and judgment heretofore made herein.

It is hereby further certified that this court is the highest court of law and equity in the State of Ohio in which decision upon these cases could be rendered.

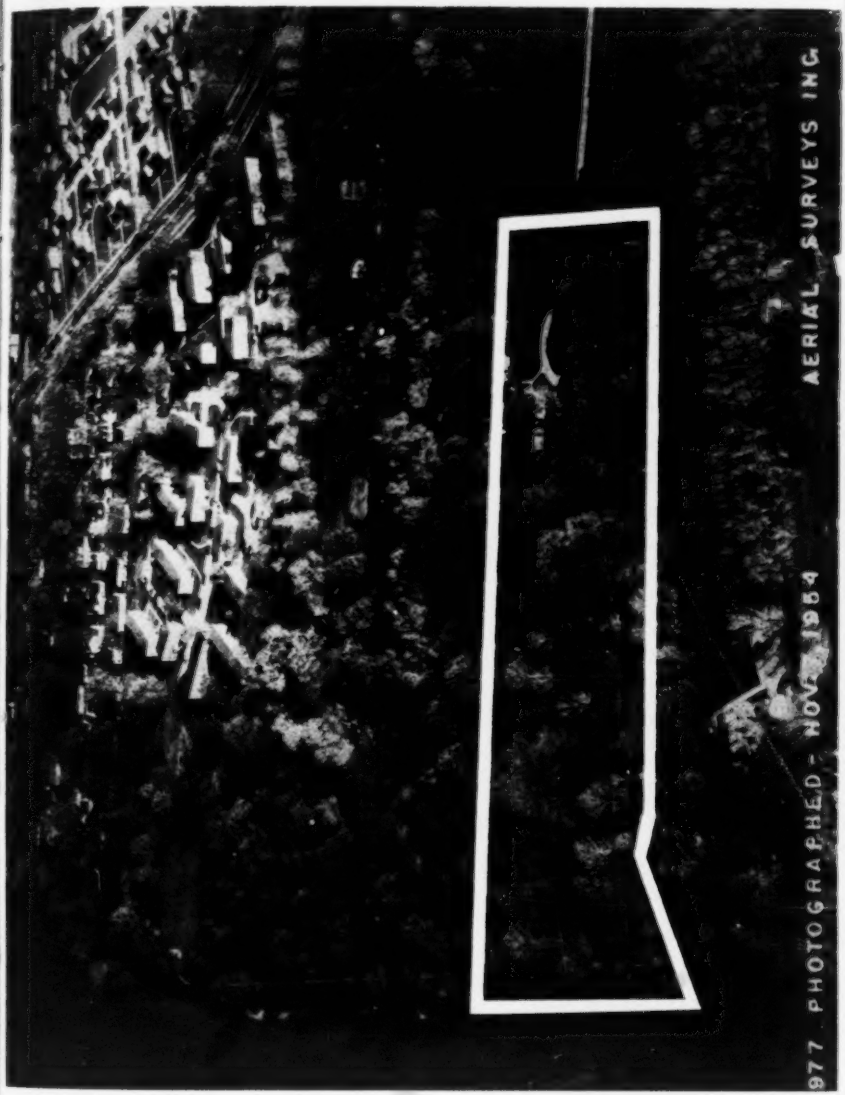
/s/ CARL V. WEYGANDT,
Chief Justice,
Supreme Court of the State of Ohio.

APPENDIX E.

The Lakeshore Company Exhibit 6.



APPENDIX F.
Zevin Exhibit 6.



FILED
FEB 20 195
JOHN T. FEY, C

In the Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 703 and 704.

THE LAKESHORE COMPANY,
Petitioner,
vs.
THE CITY OF EUCLID,
Respondent,
and
BENJAMIN D. ZEVIN and LILLIAN C. ZEVIN,
Petitioners,
vs.
THE CITY OF EUCLID,
Respondent.

BRIEF OF RESPONDENT, THE CITY OF EUCLID, In Opposition to Petition for Writ of Certiorari.

PAUL H. TORBET,
Director of Law of the City of Euclid, Ohio,
585 East 222nd Street,
Euclid, Ohio,
PERRY L. GRAHAM,
Union Commerce Building,
Cleveland, Ohio,
Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9647

TABLE OF CONTENTS.

Preliminary Statement 1

Statement of the Cases 2

Question Presented 6

Reasons Why the Writ Sought Should Be Denied 6

Conclusion 11

TABLE OF AUTHORITIES.

Cases.

Dallas, City of, v. Andrews, 149 Texas 609 8

Euclid v. Ambler Realty Co., 272 U. S. 365 (1926) 3, 11, 12

Olsen v. United States, 292 U. S. 246 7

Text.

4 *Nichols on Eminent Domain,* 141, Sec. 12.322 8

Statutes.

Ohio Revised Code:

Section 715.30 7

Sections 719.01-719.21 (Chapter 719) 2

Section 719.01 2

Section 719.09 10

In the Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 703 and 704.

THE LAKESHORE COMPANY,

Petitioner,

vs.

THE CITY OF EUCLID,

Respondent,

and

BENJAMIN D. ZEVIN and LILLIAN C. ZEVIN,

Petitioners,

vs.

THE CITY OF EUCLID,

Respondent.

BRIEF OF RESPONDENT, THE CITY OF EUCLID, In Opposition to Petition for Writ of Certiorari.

PRELIMINARY STATEMENT.

The brief of the petitioners, incorporated in their petition, does not, we believe, present a correct statement of the question sought to be presented to this Court.

The Respondent, City of Euclid, will therefore set forth under the heading "Statement of the Cases" a restatement of the cases below, which we believe is a clearer and more exact summary of the record.

STATEMENT OF THE CASES.

The cases originated in appropriation proceedings instituted by the City of Euclid, pursuant to the provisions of Chapter 719 of the Revised Code of Ohio.[1] An application was filed in the Common Pleas Court of Cuyahoga County for a jury to be empanelled to assess the compensation due to the owners of certain lands appropriated by the Council of the City of Euclid for purposes of a municipal park and other municipal uses.

The property appropriated was an area of land located along the northerly side of Lake Shore Boulevard, in the City of Euclid and extended northwardly to the shore of Lake Erie. The frontage on the northerly side of Lake Shore Boulevard was approximately seven hundred feet. The frontage on Lake Erie was somewhat larger by reason of the fact that the sidelines of the parcel appropriated were not parallel.

There were four separate record owners of parcels of land composing the parcel appropriated by the City of Euclid. Each of such separate owners were named parties to the proceedings.

For purposes of trial, the trial court ruled that each separate owner was entitled to a separate trial and verdict as to the compensation due to him or it, but before the same jury, pursuant to the provisions of Chapter 719 of the Revised Code of Ohio.[2] The trial was conducted in such manner. The evidence in the hearings as to the com-

---

[1] The Municipal Appropriation Act consists of Sec. 719.01 through Sec. 719.21, Revised Code of Ohio.

[2] *Sec. 719.01* of the Revised Code of Ohio provides:

"The assessment of compensation by a jury as provided in Section 719.08 of the Revised Code shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained."

pensation due each owner was substantially the same, except as to the value of each separate parcel.

Three of the four property owners appealed to the Court of Appeals for the Eighth Judicial District of Ohio, who affirmed the verdicts. Only the petitioners here appealed to the Supreme Court of Ohio, who denied motions to certify.

The first of the property owner's witnesses described the zoning restrictions of the lands not only on the northerly side of Lake Shore Boulevard, but also on the south side thereof. Such evidence is well summarized in the Court of Appeals' opinion (pages 4a and 4b of Appendix to Petitioners' petition). Such first witness of the petitioner further not only testified, but identified exhibits which were introduced in evidence by the petitioners, which uncontradictedly demonstrate that there was not then presently or in the then foreseeable future any probability of any amendment of the zoning ordinance of the City of Euclid which would permit the use of the lands lying on the northerly side of Lake Shore Boulevard for a lesser restricted use than at present.[3] No evidence was introduced or offered which would tend to controvert the testimony of petitioner' such witness. As stated by the Court of Appeals (p. 5a of Appendices to the petition):

> "There is no evidence in the record that would indicate that there is the slightest probability that the

---

[3] Petitioners' evidence was that there had been no zoning amendments in Euclid lessening residential requirements to permit business on the north side of Lake Shore Boulevard from East 222nd Street east to the east boundary of the city, being the area in which petitioners' lands are located, since the adoption of the Ordinance in 1922, being the same ordinance that was before the Court in *Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926). Also, petitioners' uncontroverted evidence was to the effect that the present trend in city planning in Euclid is to more highly restrict the lands abutting on Lake Shore rather than to lessen the use restrictions.

> city authorities will lessen the use restrictions of its zoning ordinances in the neighborhood in which the property here appropriated is located. The property of the defendants is lakefront property originally used as country estates and surrounded by single family dwellings and apartments, some of the garden-type, and two-family houses fronting on the Boulevard. The zoning ordinances of the City of Euclid have maintained the standard of this territory as a residential area and there is not the slightest evidence that within the foreseeable future any lessening of use restrictions will occur."

Such statement of the Court of Appeals is a fair summary of the record not only at the times complained of in petitioners' brief, but also at the end of the trial.

With such state of the record the petitioners produced so-called expert witnesses, of whom it was inquired as to what they considered to be the highest and most valuable use to which the property being appropriated could be put. (The uncontradicted evidence was that the property was restricted as set forth in the quotation above made from the Court of Appeals' opinion.) Such witnesses were then called upon to testify as to their opinion as to the market value of the parcel sought to be evaluated for its highest and best use. Counsel for the City of Euclid objected to the question as put until the inquiry be limited to the market value of the property for the highest and best use to which it could reasonably be lawfully put in view of the zoning restrictions. Such objection with such limitation was consistently sustained, throughout the proceedings, by the trial court.

The petitioners consistently declined to introduce any evidence as to the market value of the parcels in question for the highest and most valuable use to which they might lawfully be put. The City of Euclid produced evidence

of experts on the value of the property for the highest and most valuable use to which the property might be lawfully put.[4] The jury returned its verdicts equivalent to the highest value testified by such experts. As stated by the Court of Appeals (p. 5a of Appendices to Petition):

> "In each instance the jury's verdict was for the highest value given by the city's expert witnesses, there being no other testimony on the subject of value, the defendants' experts not being asked to testify as to their opinion of the value of the various parcels when considered for the highest and best use for which the property was zoned."

There was no evidence offered as to the cost of the parcels in question. The footnote set forth on page 6 of petitioners' brief is a statement outside of the record. We therefore have no knowledge as to whether it be true or false. The statement on page 114 of the Zevin record is as follows:

> "Q. What was the fair price of the property known as Parcel No. 1, which you sold to The Lakeshore Company?
>
> (This question was objected to and objection sustained.)
>
> "Mr. Sellers: If permitted to answer, we expect the witness to say: $124,750.00."

Likewise, the reference to page 109 is:

> "Q. Referring to the sale of the front of the property to the Lakeshore Company, and I understand you were a party to the deed?
>
> A. Yes, sir.
>
> Q. What was the sale price?

---

[4] The City had employed the Valuation Committee of The Cleveland Real Estate Board to make the appraisal. Three of the committee members testified as to fair market values.

Mr. Graham: I object.

A. $117,000—

The Court: Wait a minute. Objection sustained." [5]

From such state of the record, it is patent that the only question of law that could be presented is:

QUESTION PRESENTED.

Where the property owner's uncontradicted evidence, when construed most favorably to him, shows that there is little or no prospect that the zoning classification of property being taken in an appropriation proceeding may be changed within the reasonably foreseeable future, so as to permit a less restricted use of the property being appropriated, is the property owner deprived of property without due process of law where the jury is limited in its determination of the compensation due and payable to the owner in an appropriation proceeding to the fair market value of the lands taken when used for the highest and most valuable use to which they may lawfully be put by reason of the provisions of a municipal zoning ordinance?

REASONS WHY THE WRIT SOUGHT SHOULD BE DENIED.

In view of the record in this case in the state court it is patent that the trial court in its admission of evidence and its instructions to the jury followed strictly the rule established by the uniform course of decisions of the courts throughout the United States. It merely restrained the property owner from attempting to establish a purely

---

[5] The transfer was from one petitioner (Zevin) to the other petitioner (Lake Shore Co.), after the appropriation proceeding was filed in court. It was not an arm's length transaction.

speculative value which was without probability. As stated by Mr. Justice Butler, in *Olsen v. United States*, 292 U. S. 246, 257:

> "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration for that would be mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth."

The trial court in the instant case followed the rule thus stated by this Court. There was no evidence of any reasonable probability that the lands in question would ever be rezoned in such manner that they could be used for commercial use. In fact, petitioners' own evidence strongly tended to establish that there was no tendency in such direction.[6]

In the decisions of the state courts of the various jurisdictions there has been established a rule as to when

---

[6] The trial court, in an action brought before it, would be required to enjoin any violation of the Euclid Zoning Ordinance. *Sec. 715.30* of the Revised Code of Ohio provides:

> "No person shall erect, construct, alter, repair, or maintain any residential building, office, mercantile building, workshop, or factory, including a public or private garage, or other structure, within any municipal corporation wherein ordinances or regulations have been enacted pursuant to Sections 715.26 to 715.29, inclusive, of the Revised Code, or Section 3 of Article XVIII, Ohio Constitution, unless said ordinances or regulations are fully complied with. In the event any building or structure is being erected, constructed, altered, repaired, or maintained in violation of any such ordinances or regulations, or there is imminent threat of violation, the municipal corporation, or the owner of any contiguous or neighboring property who would be especially damaged by such violation, in addition to any other remedies provided by law, may institute a suit for injunction to prevent or terminate such violation."

evidence of the value of a property for uses other than those permitted by zoning ordinances may and may not be received in an appropriation proceedings. It is well stated in 4 *Nichols on Eminent Domain,* 141, Sec. 12.322, as follows:

> "Insofar as existing zoning restrictions circumscribe the available uses to which land may be devoted they unquestionably affect the market value of property and no evidence in support of an enhanced value may be given where such enhanced value would be the result of a proscribed use.
>
> "However, where the enactment of the zoning restrictions was not predicated upon the inherent evil of the prescribed use—in other words, where the forbidden use is malum prohibitum rather than malum per se—and there is a possibility that the zoning restrictions may in the future be repealed or amended so as to permit the use in question, such likelihood may be considered *if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon the present market value.* It follows from the foregoing that *such possible change in the zoning regulations must not be remote or speculative.*" (Emphasis ours.)

Many authorities are collected by such author supporting such rule.

For a period of time the intermediate courts of the State of Texas followed a different rule, but in *City of Dallas v. Andrews,* 149 Texas 609, the Supreme Court of that state set aside such former rule by the following pronouncement in paragraph 7 of the syllabus:

> "7. Where zoning ordinances or other legal restrictions apply to property which is subject of condemning proceeding, whether consideration should be given to the use for which the property is suitable and adaptable, though prohibited by the zoning or-

dinance, for the purpose of arriving at market value, is dependent upon whether the trial judge is satisfied from the evidence as a whole that there is a reasonable probability that the zoning or other restriction will be lifted within a reasonable time, in which event the evidence of other uses may be considered, *but* a contrary conclusion requires an exclusion of the evidence."

The Court of Appeals in its opinion (Petitioners' Brief, p. 18a) aptly and succinctly states the condition of the record which shows that it would have been improper to admit the evidence as to value which the petitioner claims was improperly excluded, as follows:

"The evidence shows that all of the lakefront property from the southern shore of Lake Erie to Lake Shore Boulevard is zoned for single family dwellings except the property fronting on the Boulevard in most instances to a depth of one hundred fifty feet which is zoned for multi-family units. This depth has been extended one or two hundred feet in one or two instances for a garden-type multi-family development. The only retail business now allowed on the north side of Lake Shore Boulevard, near the property taken as shown by the evidence, is between 218th is no evidence in this record that would indicate any Street and 224th Street. As was stated above, there is no evidence in this record that would indicate any purpose on the part of the public authorities or the slightest probability that the City will within the foreseeable future lessen the use restrictions of its zoning ordinance dealing with its lakefront property nor does any trend of development in the neighborhood where this property is located indicate that in the foreseeable future a plan of city development of single homes will in the interests of city planning require changes causing greater congestion and increased traffic hazards on its public thoroughfares. It

could be argued that the rapid growth of this city of homes came into being because of the zoning protection of the householder." (Emphasis supplied.)

Since the record discloses that petitioners' own evidence shows t[illegible] was no probability that the property taken could law[illegible]ly be used for the purpose upon which their speculati[illegible] evidence of value was based, or in other words that there was no reasonable probability that the property would be rezoned to permit such use, we submit that the evidence was based upon speculation as to unforeseeable probabilities and would be inadmissible under the rules of evidence in any state in an appropriation proceeding. The refusal of such evidence could not under any theory of law constitute a taking of property without due process of law, as asserted by petitioners.[7]

Since the trial of the appropriation proceeding, an amendment to *Sec. 719.09* of the Municipal Appropriation Act of Ohio has become effective. This amendment excludes from consideration in determining fair market value any use which is in violation of any statute or ordinance. The section now reads:

"Sec. 719.09—SIGNING ASSESSMENT.

The assessment of compensation by a jury as provided in Sec. 719.08 of the Revised Code shall be in writing, signed by the jury, and shall be so made that the amount payable to the owners of each lot or parcel of land may be ascertained.

In arriving at such assessment of compensation for such lot or parcel, any use or occupancy which is in violation of any statute or ordinance, shall be excluded from consideration in determining fair market value."

---

[7] The Trial Court was also cognizant of the strong presumption of validity, which applies to legislative acts in general, and with equal force to a zoning ordinance.

If this Court were to reverse the state courts in these cases, limiting the evidence of value to the highest and most valuable lawful use under the existing zoning ordinance, which petitioners' own evidence showed there was no probability of change in such zoning ordinance so as to permit a less restrictive use, and remand the cases for a new trial, the Trial Court would be confronted with the present provision of the above section of the Ohio Municipal Appropriation Act.

CONCLUSION.

Our opponents have cited the celebrated case of *Euclid, et al. v. Ambler Realty Co.*, 272 U. S. 365 (1926) as authority for modern zoning ordinances. In this we agree. The same Euclid ordinance was before the Court in that case. There it was determined the ordinance stood, since the regulations pursuant thereto were fairly debatable. There also, in answer to complaint of the property owner against the planning of the city, Mr. Justice Sutherland in the *Opinion* said:

> "If the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the court to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal corporations."

Contrary to the statement in petitioners' brief that the city had used its zoning power to confiscate the use of petitioners' lands, the evidence they offered was that the current residential zoning had been maintained on the lands and their surrounding area north of Lake Shore Boulevard under the general city plan, for many years prior to acquisition by petitioners. They complain of the

same Euclid ordinance sustained in the *Ambler* case. They argued below the ordinance was archaic and in contrast that legislative authority, to protect the public health, morals, safety and general welfare of the people by zoning regulations, must yield in favor of real estate "experts," where their own evidence showed no probability of a zoning change within the foreseeable future.

Such evidence of the petitioners was on appeal carefully considered and weighed by the judges of the Eighth Appellate District of Ohio. Unanimously the verdicts were judicially determined to be correct and just compensation. To hold otherwise would mean to permit conjectural elements and speculation with attendant swollen awards, which the Federal Constitution does not compel. Here the petitioners' awards do no violence to constitutional guaranties. They represent market values for the most profitable and valuable use to which the lands may lawfully be put.

For these reasons no question is presented for Federal review. The trial proceeded conformably to petitioners' rights and privileges. The jury awards represent just compensation under the Federal standard.

Respectfully submitted,

PAUL H. TORBET,
Director of Law of the City of Euclid, Ohio,

PERRY L. GRAHAM,
Special Assistant,
Counsel for Respondent.